UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

DUXBURY TRUCKING, INC.,	)	
Plaintiff,	)	
	)	
v.	)	**Civ. Action No. 04cv12118-NG**
	)	
MASSACHUSETTS HIGHWAY DEPARTMENT;	)	
MASSACHUSETTS TURNPIKE AUTHORITY;	)	
EDWARD W. MORRIS, JR., Federal Highway	)	
Administration, (Former) Associate Administrator for	)	
Civil Rights; BRENDA ARMSTEAD, Federal Highway	)	
Administration, Equal Opportunity Specialist;	)	
ARTHUR ("GENE") ARMSTEAD, Federal Highway	)	
Administration, Eastern Resource Center, Civil Rights	)	
Team; STANLEY GEE, Federal Highway	)	
Administration, District Administrator; PATRICIA	)	
O'BRIEN, Massachusetts Highway Department,	)	
(Former) Director of Office of Civil Rights; and	)	
LORENZO PARRA, Massachusetts Highway	)	
Department, Director of Office of Civil Rights,	)	
Defendants.	)	

GERTNER, D.J.:

MEMORANDUM AND ORDER RE: MOTION TO DISMISS
April 29, 2009

I. BACKGROUND

This case began on October 6, 2004, when Duxbury Trucking, Inc. ("Duxbury"), a woman-owned enterprise, filed a complaint against the Massachusetts Turnpike Authority ("MTA"), the Massachusetts Highway Department ("MHA"), the Federal Highway Administration ("FHA"), and officials of both the state and federal agencies in their individual capacities. All claims against the state defendants have been dismissed on statute of limitations

grounds. After two rounds of extensive briefing over more than four years, and with considerable reluctance, I now dismiss the remaining federal defendants.[1]

The facts are recounted in detail in two previous orders. See Mem. & Order, Sept. 13, 2005 ("2005 Order") (document # 32); Mem. & Order, Mar. 6, 2007 ("2007 Order") (document # 57). I briefly review them here. Duxbury claims under 42 U.S.C. § 1983 that the state defendants illegally discriminated against it and other woman-owned businesses working on the "Big Dig" construction project. Specifically, the state agencies failed to enforce the union labor agreement and the state prevailing wage statute that governed the relationship between prime contractors and subcontractors like Duxbury. Because Duxbury's owner, Susan Martinsen, to her enormous credit, refused to underpay her workers and falsify her payroll records, she could not compete with other subcontractors.

As I indicated in my Order of March 6, 2007, businesses owned by women and minorities have long faced significant and unfair barriers to entry into the marketplace. To address that discrimination, both the state and federal governments have established programs to give certified women- and minority-owned corporations the chance to compete. See, e.g., Mass. Gen. Laws ch. 7, § 40N (discussing the percentage of capital facility projects reserved for Massachusetts' women- and minority-owned businesses); see also 23 C.F.R. § 230.203 (explaining the Federal

[1] The federal defendants are: Edward Morris, Jr., former associate administrator for Civil Rights of FHA; Brenda Armstead, equal opportunity specialist at FHA; Arthur "Gene" Armstead, FHA Civil Rights Team; and Stanley Gee, FHA District Administrator. Though the docket lists the FHA itself as a defendant, the original complaint did not purport to sue the agency directly, see Compl. ¶¶ 8–13 (document # 1), and the amended complaint makes clear that the federal defendants are being sued strictly in their individual capacities, see Pl.'s Motion to Amend Compl. ¶ 5(c) (document # 26). A Bivens action cannot lie directly against a federal agency. See FDIC v. Meyer, 510 U.S. 471 (1994).

Highway Administration's efforts "to promote increased participation of minority business enterprises in Federal-aid highway contracts").

Duxbury Trucking, Inc. was just such a business. Certified as a Woman-Owned Business Enterprise ("WBE"), Duxbury Trucking provided hauling services on Boston's multi-billion dollar Central Artery/Tunnel Project (the "Big Dig"). In theory, Duxbury Trucking's WBE status should have enabled it to compete for bids and perform work on the same terms as any other trucking subcontractor. In Martinsen's case, however, the reality of work on the Big Dig fell far short of what the WBE program seemed to promise. No longer able to service its debts, having exhausted its capital, and unable to meet its payroll, Duxbury Trucking ceased competing for Big Dig bids in 1999. Today, the company is gone. And as I noted in 2007:

> It is clear to this Court that Ms. Martinsen was wronged, and that the wrong she suffered was uniquely governmental. Though the WBE program offered Martinsen an opportunity to compete, the inefficiency, inattention, and incompetence of the multiple layers of government tasked with overseeing the Big Dig made it impossible for Duxbury Trucking to become a true competitor. When faced with the choice of staying in business or complying with her legal and contractual obligations, Martinsen had no option but to park her trucks. She attempted to complain, but got nowhere. The promise of the WBE program turned out to be empty.

2007 Order at 4 (document # 57).

On or about September 27, 2000, Duxbury Trucking filed a complaint with the FHA, alleging that the MHD and the MTA discriminated against it as a WBE. Defendant Morris was assigned to handle the complaint and the ensuing investigation. Defendants B. Armstead, G. Armstead, and Gee contributed to the FHA's response to Duxbury Trucking's complaint. While the complaint was pending, "several of these individuals" allegedly told Duxbury Trucking to

"bear with" the process because a finding of discrimination would be forthcoming and would translate into a monetary award. The FHA even generated an initial report finding that Duxbury Trucking was the victim of discrimination as a WBE. Nonetheless, on March 3, 2003, Morris denied the complaint, and on June 19, 2003, he denied Duxbury Trucking's request for reconsideration. Shortly thereafter, the plaintiff filed a Freedom of Information Act ("FOIA") request for the materials generated by the FHA during the investigation of its complaint. The FHA produced some, but not all, of these documents in April 2004, over a year after the FOIA was filed.

The problem for Ms. Martinsen, however, is that over the past decade the federal legal protection for claims like hers has -- sadly -- eroded. Her discrimination complaint failed because the case law changed, concluding that there is no private right of action for disparate impact discrimination under Title VI. Her due process claims against the state defendants -- claiming that plaintiff was deprived of a property interest without due process when it was forced to cease operations due to the non-enforcement of the payment regulations -- were time barred. They were time barred because of the federal defendants' delays in processing its FHA complaint. After lengthy -- too lengthy -- consideration, I have concluded that the due process claims against the federal defendants are also not legally actionable under Bivens. v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) (plaintiff permitted to bring action for money damages against federal agents as individuals for injuries caused by their violation of plaintiff's Fourth Amendment rights). Since 1971, the Bivens case law has moved dramatically and in one direction, narrowing the availability of this claim more and more. The outcome is surely

troubling, but the law seems clear.[2] Duxbury may not sue directly under the Constitution as the plaintiffs in Bivens did.

II. DISCUSSION

A. Allegation of a Constitutional Violation

The threshold issue in this analysis is whether the facts alleged in the complaint are sufficient to support a constitutional violation. See Mahoney v. Nat'l Org. for Women, 681 F. Supp. 129, 132 (D. Conn. 1987) (noting that, as an initial matter, a Bivens claimant "must show he has been deprived of a right secured by the Constitution and the laws of the United States").

Duxbury's constitutional claim is predicated on the Fifth Amendment's Due Process Clause. It is clear that Duxbury has a protected property interest in any lawsuits that it may have pursued. See 2007 Order at 21 (document # 57); see also Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982) ("[A] cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause" (citing Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950)); Konizeski v. Livermore Labs, 820 F.2d 982, 989 (9th Cir. 1987) (same under Fifth Amendment's Due Process Clause). What is not clear is that the delay on the part of the federal defendants "deprived" Duxbury of that property interest, since that delay did not wholly extinguish the potential claims.

In the closest case on point, N.Y. State Nat'l Org. for Women v. Pataki ("N.Y. State NOW"), a panel of the Second Circuit split on this question. 261 F.3d 156 (2d Cir. 2001). There, a class of plaintiffs who had filed discrimination complaints with a state agency brought a §

[2] Since I conclude that a Bivens- style cause of action is inappropriate, I need not decide whether the federal defendants should be shielded by qualified immunity.

1983 suit for denial of procedural due process, based on protracted delays in processing and deficiencies in notice preceding dismissal. Because the court held that the class members had been afforded constitutionally adequate process, it declined to resolve "whether actual prejudice to a cause of action following a period of extreme government delay is sufficient to make out a property deprivation, or whether instead the government action must flatly extinguish the cause of action before a property deprivation can be made out." Id. at 167.

Nevertheless, the range of opinions is significant. Writing for the majority, Chief Judge Walker expressed "deep reservations" that "delay-plus-actual-prejudice" would suffice to constitute a due process deprivation. Id. at 166. Judge Calabresi, by contrast, suggested that "we might well conclude that unwarned-of delay plus actual prejudice could in appropriate circumstances deprive a plaintiff of a property interest that triggers due process rights." Id. at 173 (Calabresi, J., concurring). Judge Meskill explored the issue in some depth, opining that the agency's delay was not actionable under the Due Process Clause. Id. at 173 (Meskill, J., concurring). On his reading, Logan v. Zimmerman Brush Co., 455 U.S. 422 -- the Supreme Court case establishing that legal causes of action are property -- "is replete with references to the total extinguishment or final destruction of an individual's cause of action." 261 F.3d at 174. To date, the First Circuit has not addressed the question.

In the instant case, the harm allegedly caused by the FHA's delay came in two forms. First, Duxbury asserts that "witnesses have moved . . . and it is likely that documents have been purged and memories have faded." Compl. ¶ 78. Second, in reliance on "assurances that the investigation would be conducted in a timely manner . . . , the plaintiff did not pursue available State and Federal causes of action within applicable limitations periods." Id.

In effect, Duxbury is arguing more than delay, more than the kind of prejudice that derives from decayed evidence and missed opportunities, with which Judge Meskill was concerned in N.Y. State NOW; 261 F. 3d at 174 (noting that if mere evidentiary decay or the passage of time constitutes a cognizable deprivation, then "any plaintiff who testifies to actual prejudice [can] create an issue of fact for trial"). Rather, Duxbury argues that the FHA encouraged the plaintiff to be patient. In a situation where a government actor (1) affirmatively encourages a complainant to await an agency's decision, *and* (2) that determination is unreasonably delayed, *and* (3) alternative causes of action become time-barred during that delay, it seems more plausible to hold that a deprivation has occurred. In such a situation, the claims are legally no longer available due to the statute of limitations, which makes them closer to being "extinguished." While the plaintiff could have (and should have) brought its other claims before they expired, a pro se plaintiff such as Duxbury might interpret the government actor's advice that patience would lead to "dollar signs," Compl. ¶ 44 (document # 1), as an indication that the plaintiff should *not* take other legal action. As such, it could be reasonable to hold that the federal defendants' delay *plus* their affirmative statements urging patience induced the plaintiff to wait until alternative claims were in fact legally extinguished, and thereby deprived Duxbury of property.

B. Availability of a Bivens Claim

However, even if Duxbury has alleged a constitutional violation, it does not follow that it is entitled to recover monetary damages against the federal defendants. 42 U.S.C. § 1983 does not apply to officers of the federal government unless the plaintiff alleges joint violations with state officials. Dombrowski v. Eastland, 387 U.S. 82 (1967). I have already found inadequate evidence of such collusion. See 2007 Order at 17-18 (document # 57) (holding that the ten

weeks attributable to the state defendants does not amount to complicity and noting that the plaintiff has provided no evidence of misleading conduct by the state defendants). Thus, these claims are cognizable only if I recognize a cause of action in the style of Bivens.

To determine whether a Bivens action will lie against the defendants, I must undertake a two-step analysis:

> In the first place, there is the question whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages. . . . But even in the absence of an alternative, a Bivens remedy is a subject of judgment: "the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation."

Wilkie v. Robbins, 127 S. Ct. 2588, 2598 (2007) (citation omitted) (quoting Bush v. Lucas, 462 U.S. 367, 378 (1983)). I conclude that adequate remedial mechanisms do not exist here (Bivens step one) but that recent Supreme Court case law counsels strongly against extending Bivens to a case on these unique facts.

1. Bivens Step One -- Adequate Remedial Mechanisms

Under Schweiker v. Chilicky, courts may not craft a Bivens action where "the design of a government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of [the program's] administration." 487 U.S. 412, 423 (1988). The Supreme Court made clear that so long as Congress would deem the alternative relief adequate, it does not matter that "Congress has failed to provide for 'complete relief.'" Id. at 425. Here, the defendants contend that a Bivens action is

precluded by both the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 551 et seq., and the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. I disagree.

a. APA

To enforce the mandate of Title VI, the Department of Transportation has promulgated regulations outlining procedures for the investigation of any claims that recipients of federal funds are engaging in discriminatory practices. See 49 C.F.R. § 21. If the department (acting in this case through the FHA) finds that a recipient of federal funding is in fact unlawfully discriminating, it will first employ "informal means" to bring about the recipient's voluntary compliance with the law. Id. § 21.13(a). Absent voluntary compliance, the department can ensure compliance via a "refusal to grant or to continue Federal financial assistance or by any other means authorized by law," id., including lawsuits against the state agencies for money damages. See 42 U.S.C. § 2000d-7(a)(2).

The department's regulations and Title VI indicate that the FHA's handling of such a claim is subject to judicial review under the rubric of the APA. See 42 U.S.C. § 2000d-2; 49 C.F.R. § 21.19. In relevant part, the APA provides that a court may review the agency's actions or its failure to take any action, and may issue an injunction to remedy any defects in the agency's handling of the matter. See 5 U.S.C. §§ 700-701.

The FHA investigation could not itself have resulted in an award of damages to Duxbury; it would only have led to a finding of discrimination that Duxbury could have relied upon in a separate lawsuit. However, such a finding was not a *necessary* precondition for separate suit. The question is whether Duxbury's ability, under the APA, to obtain an injunction compelling the FHA to render a decision is an adequate remedy for the deprivation.

Most circuits that have reviewed this question have held that the APA generally precludes Bivens actions under Schweiker. For example, the Eighth Circuit has held that "[w]hen Congress has created a comprehensive regulatory regime, the existence of a right to judicial review under the APA is sufficient to preclude a Bivens action. Parties may not avoid administrative review simply by fashioning their attack on an agency decision as a constitutional tort claim against individual agency officers." Neb. Beef, Ltd. v. Greening, 398 F.3d 1080, 1084 (8th Cir. 2005) (citation omitted) (citing Sinclair v. Hawke, 314 F.3d 934 (8th Cir. 2003)); see also Robbins v. Wilkie, 300 F.3d 1208, 1212 (10th Cir. 2002) ("The APA is the proper avenue for reviewing an agency's action or decision. If Appellant attempted to hold Defendants liable for alleged constitutional violations committed while reaching a final agency decision, a Bivens action would not be available."), rev'd on other grounds sub nom Wilkie v. Robbins, 127 S. Ct. at 2598; Zephyr Aviation, L.L.C. v. Dailey, 247 F.3d 565, 572 (5th Cir. 2001) ("Parties may not avoid administrative review simply by fashioning their attack on an [agency] decision as a constitutional tort claim against individual [agency] officers."). However, the D.C. Circuit has intimated that it disagrees with this broad preclusive reading of the APA, and the Supreme Court has not decided the issue. Munsell v. Dep't of Agric., 509 F.3d 572, 590 (D.C. Cir. 2007).

The best argument in Duxbury's favor is that the APA review is hardly adequate because Duxbury is ineligible for relief. See Munsell, 509 F.3d at 590. Since Duxbury is now time-barred from suing the state defendants, any injunction compelling an FHA determination under the APA would be useless. To be sure, while an injunction may *currently* be of no use to the plaintiff, it might have been an adequate remedy if the plaintiff had timely filed its suit against the state defendants. Still, Duxbury's claim is that the defendants affirmatively discouraged Martinsen

from filing suit. Under these circumstances, the APA cannot preclude a Bivens remedy for the narrow harm at issue here.

b. FOIA

Courts addressing the preclusive effect of the FOIA on Bivens actions have held "that the comprehensiveness of FOIA precludes the creation of a Bivens remedy" for violations of that act. Johnson v. Exec. Office for U.S. Attorneys, 310 F.3d 771, 777 (D.C. Cir. 2002). A party seeking information under FOIA is asking for a very specific action: the production of documents. The statute, unlike many other wide-ranging statutory schemes (including Title VI), does not seek to enact a broad program that implicates the distribution of financial resources. In other words, whereas many statutory schemes involve compensatory relief, the FOIA regime seems more amenable to "specific performance" (i.e., forcing the agency to produce the documents the claimant seeks). And specific performance is precisely what FOIA allows a district court to achieve by ordering an agency to release records. See 5 U.S.C. § 552(a)(4)(B).

Here, delivery of the documents would have alerted Duxbury to what was actually going on with the federal investigation. To be sure, specific performance is generally thought to be a better remedy than damages. See Melvin A. Eisenberg, Actual and Virtual Specific Performance: The Theory of Efficient Breach and the Indifference Principle in Contract Law, 93 Calif. L. Rev. 975, 978 (2005). But here, specific performance would do little for Duxbury. Again, its claim is that the federal officials' delay deprived the company of its ability to bring suit against the state defendants. Production of documents after the statute of limitations has run cannot restore the property interest Duxbury had in those legal claims. Accordingly, I decline to find that FOIA

precludes the creation of a Bivens action with respect to Duxbury's claim for the production of documents. Even so, as explained below, the claim still falters.

2. Bivens Step Two

Step two of the inquiry requires me to make a judgment about the wisdom of authorizing "a new kind of federal litigation" for the harm alleged by Duxbury. Bush v. Lucas, 462 U.S. 367, 378 (1983). In making this determination, I cannot write on a blank slate. Recent Supreme Court law makes it clear that a Bivens claim would not be sustainable here.

When Bivens was first decided, its animating logic was that a constitutional injury requires access to a remedy. It therefore implied a presumption in favor of crafting common law causes of action when "equally effective" alternative remedies are unavailable. See Bivens, 403 U.S. at 397. The doctrine has shifted noticeably since that time. The Supreme Court has recognized Bivens causes of actions in two contexts: it allowed a woman to sue her employer, a congressman, for gender discrimination under the Fifth Amendment, Davis v. Passman, 442 U.S. 228 (1979), and it allowed a mother to sue prison officials under the Eighth Amendment for her son's death, which allegedly resulted from the gross inadequacy of its medical services, Carlson v. Green, 446 U.S. 14 (1980).

By contrast, the Court declined to authorize suit by a NASA employee asserting a First Amendment claim after being demoted for making certain public statements, on the theory that Congress is best positioned to make policy judgments about remedies for federal employees. Bush, 462 U.S. at 373-74. It has likewise declined to allow a Bivens claim under the Fifth Amendment against officials of the Social Security Administration who improperly denied benefits to qualified applicants. Schweiker, 487 U.S. 412. Today, "[t]wo Justices think Bivens should be

confined to its facts [while five] others embrace an open-ended common-law approach, with no thumb on the scales one way or the other." Peter W. Low & John C. Jeffries, Federal Courts and the Law of Federal-State Relations 224 (6th ed. 2008).

Last term, the Supreme Court once again declined to extend Bivens. In Wilkie v. Robbins, 127 S. Ct. 2588 (2007), a Wyoming rancher alleged that agents of the federal Bureau of Land Management harassed and attempted to intimidate him into granting the government an easement over his property, in violation of the Fifth Amendment. The allegations were striking: federal agents trespassed on his land, boasted about their trespass to the plaintiff, threatened to cancel a reciprocal right-of-way that the previous owner had negotiated, brought civil and criminal charges against him, and put restrictions on his land use permits. Though the APA could not provide him complete relief for the alleged wrongs, the Court declined to create a Bivens remedy on step-two grounds. The Court reasoned that the judiciary is institutionally ill-equipped to fashion an appropriate remedy:

> We think accordingly that any damages remedy for actions by Government employees who push too hard for the Government's benefit may come better, if at all, through legislation. 'Congress is in a far better position than a court to evaluate the impact of a new species of litigation' against those who act on the public's behalf. Bush, 462 U. S. at 389. And Congress can tailor any remedy to the problem perceived, thus lessening the risk of raising a tide of suits threatening legitimate initiative on the part of the Government's employees.

Id. at 2604-05. Though the Court's decision did not close the door on Bivens actions completely, it did reflect a clear aversion to create extensions of the doctrine.

In some respects, Wilkie involved the obverse of the situation presented here. Whereas the defendants in that case were alleged to have acted overzealously in their advocacy of the

government's interests, the federal defendants in the instant case are alleged to have been delinquent and deliberately obfuscatory in carrying out their duties. Both cases, however, deal with the actions of federal agents in the context of their administrative duties, a context in which the Supreme Court has warned against the creation of new judicially-created causes of action.

Accordingly, I decline to recognize a Bivens remedy in the case at bar. In a factual context as ambiguous as this and an area as regulated as the ones involved here, Congress is best equipped to fashion an appropriate remedy. Though the APA and the FOIA do not preclude a new cause of action under Bivens step one, "special factors counsel[] hesitation." See Schweiker, 487 U.S. at 422-23 (describing the existence of statutory mechanisms giving meaningful remedies as such a factor); Bush 462 U.S. at 368, 386 (same). While there may well be a case in which unconscionable delay and discouragement from suit by federal officials warrant the creation of a cause of faction in the style of Bivens, this is not it.

III. CONCLUSION

Based on the reasoning described above -- and with reluctance because of the improper treatment Duxbury received -- the federal defendants' Motion to Dismiss [document # 9] is hereby **GRANTED**.

SO ORDERED.

Date: April 29, 2009 /s/ Nancy Gertner
NANCY GERTNER, U.S.D.C.